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**BEFORE THE**  
**STATE OF WISCONSIN**  
**DIVISION OF HEARINGS AND APPEALS**

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Application of R. W. Docks & Slips	)	
to Dredge Material From the Bed of	)	Case No. 3-NW-84-0101
Lake Superior, Town of Bayfield,	)	
Bayfield County, Wisconsin	)	

Application of R. W. Docks & Slips	)	
to Place Dock Structures on the Bed	)	Case No. 3-NW-95-04022
of Lake Superior, Town of Bayfield	)	
Bayfield County, Wisconsin	)	

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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

R. W. Docks & Slips, 18855 Ridgewood Road, Wayzata, Minnesota 55391, applied to the Department of Natural Resources for permits to dredge material from and construct a pier on the bed of Lake Superior in Government Lot 3, Section 22, Township 50 North, Range 4 West, Bayfield County, Wisconsin. The proposed project consists of the construction of a pier designated as Dock 5 in the Port Superior Marina. The main dock will extend into the bay for approximately 90 feet, adding approximately 50 slips to the existing marina. Further, three proposed 24 foot finger piers located on the easterly side of Dock 5 would create six additional boat slips. The main dock is eight feet in width, the finger piers are four feet in width, and both will be constructed of treated wood planks supported by a foam-filled polyethylene float system. The pier will be anchored with oak pilings.

Further, at hearing the applicants amended their application to include the further expansion of Dock 4 as set forth below. The hearing was continued for over one month to allow the Port superior Village Association and other objectors time to prepare to respond to the amended application.

The dredging project would involve removal of 15,000 cubic yards that would extend beyond the footprint of the proposed Dock 5 expansion to permit completion of the marina as platted.

The Department of Natural Resources issued a Notice of Pending DNR Permit which stated that unless written objection was made within 30 days of publication of the Notice, the Department might issue a decision on the permits without a hearing. Several timely objections were received by the Department.

On August 18, 1995, the Department forwarded the file to the Division of Hearings and Appeals for hearing.

Pursuant to due notice hearing was held on September 19-20, and November 19, 1995 at Ashland and Washburn, Wisconsin before Jeffrey D. Boldt, Administrative Law Judge (ALJ). The parties submitted written briefs and the last brief was received on June 6, 1996.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

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Port Superior Village Association, Inc., by

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## FINDINGS OF FACT

1. R. W. Docks & Slips, 18855 Ridgewood Road, Wayzata, Minnesota 55391, completed filing an application with the Department for a permit under sec. 30.12, Stats., to expand existing marina pier facilities on the bed of Lake Superior, Town of Bayfield, Bayfield County. The Department and the applicants have fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats.

2. The applicants own real property located in Government Lot 3, Section 22, Township 50 North, Range 04 West, Bayfield County. The above-described property abuts Lake Superior which is navigable in fact at the project site. The applicants own approximately 1100 feet of riparian frontage and place between 191 and 198 boat slips on five existing structures.

3. The applicants propose to expand the existing marina facilities as follows: the main dock would be extended into the water approximately 90 feet and Dock 5 as identified on Exhibit 8 would be installed, adding 50 pier slips to the existing marina facility. Further, three proposed 24 foot long finger piers on the easterly side of Dock 5 would create six additional boat slips. (See: Ex. 8) In addition, at commencement of the hearing the applicant stated that it was also seeking to expand existing Dock 4 to include 22 more slips as contemplated in the original design of the marina. At present, pier slips 174-198 on Dock 4 have been authorized; the proposal would expand Dock 4 to include slips 199-220. (Ex. 8) The piers would be anchored with oak pilings. Said piers would be constructed of treated wood planks supported by a foam-filled polyethylene float system.

4. The project also involves a separate application for a dredging contract pursuant to sec. 30.20, Stats. The proposed dredging would involve removal of more than 15,000 cubic yards and would extend beyond the footprint of the proposed Dock 5 expansion as set forth on the plat map. The dredging contract application is before the Division upon remand by the Dane Circuit Court following a review by the Wisconsin Court of Appeals in case #87-2079 [Ex. 1, #14; See: R.W. Docks v. DNR, 145 Wis. 2d 854, 429 N.W.2d 86 (Wis. Ct. App. 1988)] The applicant originally proposed to dredge 20,000 cubic yards; the Department approved 5,000 cubic yards. The instant application relates to the remaining 15,000 as set forth in Exhibit 1, #9.

5. The applicant raised numerous issues relating to whether the emergent weed-beds in the proposed project area pre-dated the installation of the existing breakwater. The record was clear that there have long been submergent weeds in the area of the project site. Dr. Meyer was able to detect aquatic vegetation in the 1938 aerial photo of the site, although he was unable to detect whether any of these plants grew above the water line. (Meyer Depo., p. 19) Meyer rendered similar opinions regarding 1965, and 1975 aerial photos. Dr. Meyer

was able to detect emergent vegetation in post-breakwater 1979, 1983 and 1990 photos. The applicant also offered the testimony of an engineer, Mr. Toro-Escobar, which suggested that the breakwater facilitated deposit of sediment west of the structure in the area which now supports a wide variety of emergent as well as submergent plants. The record as a whole supports the reasonable inference that construction of the existing breakwater has facilitated the growth of emergent plants in the area of the proposed project.

However, there is no dispute that the area has long supported aquatic vegetation that has provided habitat for fishery and other aquatic life. Mr. Powers remembered fishing the northern end of the weed bed for northern pike in the 1930's. Department staff reports from 1984 reported the environmental significance of the weed bed for fish spawning, nursery, feeding and protective cover. (Exhibits 15 and 36)

While the historical development of the site is interesting, the applicant overstates the significance of the breakwater to the present balancing between public and private rights at the project site. The issue with respect to the 30.12, Stats. permit is whether it would be "not detrimental to the public interest" in navigable waters under the present circumstances. The issue with respect to the dredging contract is whether approval of the contract would be "consistent with public rights." Given the environmental significance of the currently existing weed bed, public rights in public waters would be detrimentally impacted by the loss of rare fish and wildlife habitat, and destruction of macroinvertebrate, mussels and zooplankton communities. Dredging of this environmentally rich area would not be consistent with public rights in maintaining and preserving the state's natural resources. (See: Findings 7-10)

7. Bruce Swanson, the DNR Area Fish Manager, netted and electro shocked fish in the aquatic vegetation bed that would be severely reduced if R. W. Docks is allowed to expand its structures as set forth above. In his report, Swanson concluded that granting the application for a permit would "...result (in) a major loss of a very unique remnant habitat in an area which previously supported much more aquatic weed beds. ..." Swanson further opined as follows: "The current bed supports at least 28 species and some in very large abundances. These beds are very limited in Wisconsin's Lake Superior shore. This bed represents 10-20% of what now exists on Wisconsin's Lake Superior shoreline. I feel it plays a very strong role in the life history of the Pike's Creek northern pike population, which reach trophy size (10-20 lbs.). The proposed dredging of the bed would not only result in the loss of this fish oasis and its scenic beauty, but the further depletion and even the potential demise of the remnant Pikes Creek northern pike spawning population." (Ex. 47)

A clear preponderance of the credible evidence indicates that the proposed project would result in detrimental impacts to fishery values. A preponderance of the credible

evidence established that the area of the proposed dredging provides important habitat for game fish, forage fish and the associated macroinvertebrates and zooplankton.

8. The aquatic plant community in the proposed project site constitutes a rare environmental resource on the south shore of Lake Superior.

Dr. Emmet Judziewicz has been working on a specific project to explore the southern shoreline of Lake Superior to assess the aquatic macrophyte communities. He pointed out, in Exhibit 31, that there are only six communities of aquatic plants similar to this one on the Lake Superior shoreline. He also noted, in Exhibit 29, that he observed the rare "delicate water milfoil" at this site and that:

"Compared with other aquatic macrophyte communities observed. . . the community at Pikes Bay was unique and more valuable in three ways:

1. The greater number of submergent species present;
2. The presence of a rare species;
3. The exceptional "cleanness" of the macrophytes.

Aesthetically, this community has high values. The view from a canoe down into the submergent aquatic bed is outstanding, with a green garden of pondweeds and water milfoils sharply visible through several feet of exceptionally clear water.

The Pikes Bay macrophyte bed has unique floristic and vegetative features that are not, to my knowledge, duplicated elsewhere in Wisconsin's Lake Superior waters. Its partial or total destruction would represent a significant loss to the plant biodiversity of the region and the state." (Exhibit 29)

A preponderance of the credible evidence has shown that there has long been a bed of aquatic plants that are environmentally significant to the eco-system in and around the project site. It would not be consistent with public rights or the public interest in navigable waters to allow the destruction of these through the dredging of this area.

9. The proposed project would have a detrimental impact on wetland functional values in the area. DNR Area Water Management Specialist, Duane Lahti, reviewed this

project under NR 103, Wis. Admin. Code, which are the State's wetland water quality standards. Every project which may affect a wetland must be reviewed pursuant to this chapter. (See: secs. NR 103.01, 103.06 and 103.08)

Mr. Lahti concluded that this project does not meet the requirements of NR 103 and that the project, if authorized, would adversely affect the functional values of this wetland. Specifically, the project would injure fish and wildlife habitat, floral diversity, shoreline protection, and natural scenic beauty. Lahti noted further that rare mussel and plant species are also found at the site. Lahti concluded that, "... Dredging and dock construction would cause severe damage to the functional values of this wetland complex." (See: Ex. 41)

10. Numerous Department witnesses testified concerning the cumulative impacts which would occur on the scarce aquatic plants and habitat in Lake Superior if projects such as this are permitted. The loss of any of the few remaining intact remnant habitats would diminish the protection and preservation of Lake Superior as a natural and public resource.

11. The Department raised issues relating to the boat slip units being leased for 99 year period and offered under Chapter 703, Stats., which is the Condominium Ownership Act. The instant hearing was not noticed nor intended to address whether the existing 191 slips currently at the project site are maintained in accordance with the public trust doctrine. These matters involve significant issues relating to individual property interests and public rights and must be addressed in a separate proceeding. However, in the event that this decision is overturned upon appeal, a permit condition requiring compliance with sec. NR 326.04(08), Wis. Admin. Code, should be established. Such a permit condition would require that all new slips be made available to the public by virtue of seasonal rental of boat slips. (Id.)

12. The proposed structures will not materially obstruct existing navigation on Lake Superior. The proposed piers are in a protected bay and outside the usual pattern of navigation on the lake. However, proposed Dock 5 would have a detrimental impact on the rights of neighboring riparians. (See: Finding 14)

13. There is a dispute over the riparian status of the applicant as it relates to the proposed construction of Dock 5. (See: Ex. 8) Port Superior Village Association, Inc. (PSVA) contends that it is the riparian owner of the land contiguous to the proposed Dock 5. PSVA does not have a deed which conveys and warrants this strip of property to PSVA. Legal title to this land instead appears to belong to Port Superior Marina Association, Inc. (PSMA) by virtue of a June 22, 1987 Warranty Deed conveyed to PSMA by Mr. Holmgren. (Ex. 52) Further, PSMA has paid taxes on the strip during the period from 1987 to 1994. (Ex. 72)

PSVA argues that it has acquired a property interest in the small riparian strip by virtue of: a.) adverse possession; or, b.) because a bulkhead line, established but not recorded, indicates that the strip of land between the bulkhead line and the quay is legally part of the lake bed and can not be relied upon by PSMA to establish riparian status. Instead, PSVA argues, the proper riparian owner is the owner of the land immediately behind the bulkhead line, namely PSVA.

The Division lacks jurisdiction to determine claims of "adverse possession," and other matters seeking an essentially equitable remedy that establishes ownership by means other than a valid legal title. These matters are properly brought in circuit court. Accordingly, the ALJ does not address PSVA's claims to own the riparian lands by virtue of adverse possession. Similarly, it is not for an administrative agency to decide the legal effectiveness of an improperly recorded bulkhead line as it relates to property rights not otherwise established by a claim of title. Further, these issues are only relevant to this proceeding in the context of whether or not the applicant has carried its burden of proof that it has riparian status sufficient to warrant a permit under sec. 30.12, Stats. The issues raised by PSVA raise legitimate concerns about the riparian status of PSMA, which is not even on record as a co-applicant for the requested permit. PSMA indicates in its brief that it supports the instant permit application. From this, it is probably safe to assume that PSMA would consent to being a co-applicant for the instant permit as it relates to the proposed construction of Dock 5.

However, the issues raised by PSVA have sufficient merit that, in the event this decision is overturned on appeal, any permit issued should require two separate permit conditions to address these concerns. First, that PSMA be made a co-applicant for the permits as they relate to proposed Dock 5; second, that the co-applicants establish by affidavit that there are no pending list pendens or other claims disputing ownership of riparian lands contiguous to proposed Dock 5.

14. The proposed construction of Dock 5 would interfere with riparian interests of neighboring riparians, specifically the lagoon access channel made use of by PSVA residents. (See: Photo Exhibit 26) This narrow channel, approximately 40 feet wide, has long provided access to Lake Superior to PSVA condominium unit owners who moor numerous boats in the lagoon.

The applicant acknowledges that Dock 5 would have an impact on PSVA boaters, and proposes that these concerns could be eliminated by not installing pier slip units 222, 224, 226 and 228. (Exhibit 8) Further, the applicant would address the concerns of the 24-unit PSVA condominium owners by a proposal for yet more dredging of a new channel to the right of proposed Dock 5. Further maintenance dredging in the area would also be required, creating additional expense and uncertainty of access for PSVA owners.

The record as a whole indicates that Dock 5, even under the modified proposal of the applicant, would interfere with fundamental access rights of PSVA owners.

15. The applicants are financially capable of constructing, maintaining, monitoring or removing the structures if it should be found in the public interest to do so.

16. The proposed structures will not reduce the effective flood flow capacity of Lake Superior upon compliance with the conditions in the permit.

17. The proposed structures will not adversely affect water quality nor will they increase water pollution in Lake Superior. The structures will not cause environmental pollution as defined in sec. 144.01(3), Stats.

18. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11, Stats., and Ch. NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

#### CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue or deny an application for a permit for the construction and maintenance of structures on the bed of navigable waterways.

2. Section 30.13(1), Stats., provides in pertinent part that:

**CONSTRUCTION ALLOWED WITHOUT PERMIT UNDER CERTAIN CIRCUMSTANCES.** A riparian proprietor may construct a wharf or pier in a navigable waterway extending beyond the ordinary high water mark or an established bulkhead line in aid of navigation without obtaining a permit under sec. 30.12 if all of the following conditions are met:

(a) The wharf or pier does not interfere with public rights in navigable waters.

(b) The wharf or pier does not interfere with the rights of other riparian proprietors. . .



The proposed project does not meet the conditions necessary to allow construction of the project without a structures permit under sec. 30.12, Stats because the project will have an impact on the rights of both the public and of neighboring riparians.

3. The applicant is a riparian owner of some of the proposed project area within the meaning of sec. 30.12, Stats. However, there is some dispute as to its riparian status as to lands contiguous to Dock 5. (See: Finding 13)

4. The proposed piers described in the Findings of Fact constitute "structures" within the meaning of sec. 30.12, Stats.

5. The applicants have the burden of proof that the proposed pier structures would be not detrimental to the public interest in navigable waters. Village of Menomonee Falls v. DNR, 140 Wis. 2d 579, 605, 412 N.W.2d 505 (Wis. Ct. App. 1987)

6. The applicants have not carried their burden of proof as set forth above. Specifically, there would be detrimental impacts to the public interest in fishery values, protecting and maintaining the environment for plant and wildlife in the destruction of the weed bed as described above.

7. Section 30.20, Stats., provides that no person may remove material from the bed of a navigable lake or from the bed of any outlying waters without a contract. Subsection (2) provides, in pertinent part, that:

(2) CONTRACTS FOR REMOVAL. (a) The department, whenever consistent with public rights, may enter into contracts on behalf of the state for the removal of any material from the bed of any navigable lake or any of the outlying waters  
. . . (Emphasis added)

This provision clearly indicates that the department "may" within its discretion, enter into contracts if it is "consistent with public rights" in navigable waters.

The proposed dredging project would not be "consistent with public rights" because it would result in detrimental impacts to fishery values, aquatic vegetation and wildlife habitat.

8. The proposed piers would meet the design standards of NR 326.04(7), Wis. Admin. Code.

9. It is not clear that the proposed project would meet the public access requirements of NR 326.04(08), Wis. Admin. Code. If this decision is reversed upon appeal, a permit condition establishing such compliance should be established.

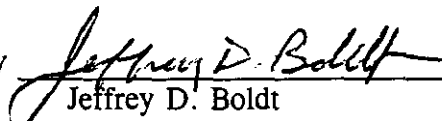
ORDER

WHEREFORE, IT IS HEREBY ORDERED that the proposed dredging contract and proposed marina expansion be DENIED.

Dated at Madison, Wisconsin on August 15, 1996.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
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By

  
Jeffrey D. Boldt  
Administrative Law Judge

## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.